UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1336

LEE LUMBER AND BUILDING MATERIAL CORP.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petition of Lee Lumber and Building Material Corp. ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's June 28, 2001 Second Supplemental Decision and Order against the Company. The Order

is reported at 334 NLRB No. 62. (A 1-11.)[1]

The Board had jurisdiction over this case pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's order is a final order under Section 10(e) of the Act and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Company filed its petition for review of the Board's order on July 30, 2001. The Board filed its cross-application for enforcement of its order on September 13, 2001. The petition for review and cross-application for enforcement were timely as the Act places no time limit on seeking review or enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company's refusal to bargain and withdrawal of recognition from the Union, and its subsequent unilateral changes to terms and conditions of employment, violated Section 8(a)(5) and (1) of the Act.

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[1] "A" references are to the appendix filed by the Company. "SA" references are to the supplemental appendix at the end of the Board's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether the Board acted reasonably within its discretion in ordering the Company to cease and desist from the unfair labor practices found.

PERTINENT STATUTES AND REGULATIONS

In addition to those statutory provisions included in the addendum to the Company's brief, the Board relies upon the following:

> 29 U.S.C. § 160(c):
>
> > If . . . the Board shall be of the opinion that any person . . . has engaged in . . . any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from engaging in such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.

STATEMENT OF THE CASE

This case was initiated by unfair labor practice charges filed by Carpenter Local No. 1027, Mill-Cabinet Industrial Division, affiliated with the United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters ("the Union") against the Company. Among other violations, the Union alleged that the Company unlawfully assisted employees in filing a decertification petition, withdrew recognition from and refused to bargain with the Union, refused to supply the Union with information relevant to collective bargaining, and implemented unilateral changes in employees' terms and conditions of employment. (A 1.) After investigation of the charges, the Board's

General Counsel issued a consolidated complaint alleging that the Company had engaged in the conduct as alleged in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). An unfair labor practice proceeding on the complaint was held before an administrative law judge.

On February 26, 1992, the Board, largely in agreement with the administrative law judge, found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by assisting employees in filing a decertification petition, refusing, in April 1990, to bargain with the Union based solely on the decertification petition, and by failing to provide the Union with requested relevant information. The Board also found that the Company violated Section 8(a)(5) when, after having resumed bargaining with the Union, it again refused to bargain with, and withdrew recognition from the Union. The Board found that the employee petition on which the Company relied was tainted by the Company's unlawful refusal to bargain in April. In line with that finding, the Board also found that the Company's unilateral changes to the employees' terms and conditions of employment violated the Act. (A 30-47.)

The Board's order required the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the order required the Company to recognize and, on request,

bargain with the Union in good faith, to provide the Union with the requested information, to remit delinquencies to the Union's training and apprentice fund from the date that the Company ceased such payments, with interest, and to post an appropriate notice. (A 28-29, 32-34.)

Subsequently, this Court granted the Board's motion to dismiss the Company's petition to review the decision and order in order to allow the Board to reconsider its decision and order in light of the Court's decisions in *Williams Enterprises v. NLRB*, 956 F.2d 1226 (1992), and *Sullivan Industries v. NLRB*, 957 F.2d 890 (1992).

On September 6, 1996, the Board issued a Supplemental Decision and Order, reaffirming its original decision and order. In so doing, the Board reaffirmed its practice of presuming that, when an employer unlawfully refuses to bargain with an incumbent union, any subsequent employee disaffection from the union is the result of the earlier unlawful refusal to bargain; therefore, that such employee disaffection is not a valid basis for questioning the union's majority status, that is, for refusing to bargain with the union. The Board held that the presumption could be rebutted only by an employer showing that the employee disaffection arose after the employer had resumed its recognition of the union and bargained for a "reasonable period of time" without committing any additional unfair labor practices. (A 26.)

The Board held that the Company, upon resuming bargaining with the Union in May 1990, then failed to bargain for a reasonable time and thus, the employee expression of disaffection in July 1990 was tainted. Accordingly, the Board reaffirmed that the refusal to bargain and withdrawal of recognition in July violated Section 8(a)(5) of the Act. Finally, the Board reaffirmed its issuance of an affirmative bargaining order to remedy the Company's unlawful refusal to bargain, withdrawal of recognition, and subsequent unilateral changes. (A 28.)

On review, this Court (Circuit Judges Ginsburg, Silberman, concurring, and Sentelle, concurring in part and concurring in judgment) affirmed the Board's findings that the Company unlawfully assisted employees in filing the decertification petition, unlawfully refused to bargain based solely on that petition, and failed to provide the Union with relevant information. *Lee Lumber and Building Material Corp. v. NLRB*, 117 F.3d 1454, 1458, 1462 (1997). (A 16, 20.)

The Court remanded for further proceedings on the issue of whether the Company's July 1990 refusal to bargain and withdrawal of recognition violated the Act, having found that the Board misapplied its test for determining whether an employer has rebutted the presumption that an unlawful refusal to bargain taints any subsequent employee expression of disaffection with a union. The Court also remanded for further proceedings on whether an affirmative bargaining order was warranted under the circumstances presented. (A 20.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Board Certifies the Union as the Collective-Bargaining Representative of the Company's Mill Shop Employees, and the Parties Negotiate a One-Year Contract; Shortly After the Union's Majority Support is Reaffirmed by a Paper Bag Poll Among Employees, the Company Assists Employees in Filing a Decertification Petition

The Company operates a mill shop in Chicago, Illinois, where it manufactures building components, such as window units, prehung doors, and molding. It is owned and operated by Company President Richard Baumgarten and Secretary-Treasurer Randy Baumgarten, both sons of the Company's founder, Lee Baumgarten. (A 23-24, 35; 352-54, 409.)

In October 1988, following a Board-conducted election, the Union was certified as the exclusive bargaining representative of the mill shop employees. The unit included approximately 14 employees. The Company and the Union subsequently entered into a collective-bargaining agreement, effective from May 26, 1989, through May 25, 1990. (A 23-24, 35; 60-61, 355-56, 424-25, 438-60.)

On February 1, 1990, the Union requested bargaining for a new collective-bargaining agreement. (A 24, 35; 62-63.) In mid-February, the parties agreed to meet on Wednesdays at alternating sites but did not start negotiations. The Company agreed to inform the Union of its availability to begin negotiations. (A 41; 63-64, 308.)

In March, the employees participated in a "paper bag" poll in which they cast ballots, with some efforts at secrecy, to determine whether they wanted the Union to continue to represent them. The Union prevailed in that poll. (A 35 n.5; 146, 151-52, 277-78, 295-96, 304.) Days later, Randy Baumgarten told employees that the Union had previously sought to replace the Company's profit-sharing plan with a union pension plan, and might do so again in negotiations for a new agreement. (A 30, 32, 35-37; 152, 410-13.) Two days later, employees Jose Barba and Jorge Alvarado solicited employees to sign a petition stating that employees sought an election to decertify the Union. (A 39; 50, 191-96, 210-13, 264-66, 300-01).

On March 20, employees Alvarado and Joe LaRosa told Randy Baumgarten that they wanted to take the petition to the Board's regional office in Chicago, and Baumgarten told them to "go ahead." Baumgarten never looked at the document, and did not know how many employees had signed it. Alvarado and LaRosa then took the document to the Board's office where it was used to support the filing of a decertification election petition. (A 24 & n.7, 39; 176-78, 213-17, 270, 417-18, 462-74.) They later asked employee Barba to join them at the Board's office. Randy Baumgarten gave Barba permission to leave work and join them. When Barba informed Baumgarten that he did not know where the Board's office was

located, Baumgarten told another employee to drive Barba there. (A 39; 191, 197-201.)

Neither Alvarado, Larosa, or Barba punched out before leaving the Company's facility. Alvarado and LaRosa were absent from work for at least 4 hours, and Barba was gone for approximately 1-1/2 hours. On Richard Baumgarten's approval, and contrary to the Company's general rule, Barba, Alvarado, and LaRosa were paid for the entire day, including overtime for Barba, notwithstanding their absence from work to go to the Board's regional office. (A 39-40; 178, 186-88, 198-202, 215-17, 270-72, 391, 397-98.) Randy Baumgarten also paid Alvarado $7.00 for the cost of parking while at the Board's office. (A 39-40; 196-206).

B. Based on the Decertification Petition, the Company Refuses To Bargain with the Union; Several Weeks Later, the Company Reverses its Decision and Agrees to Bargain but Fails to Provide the Union with Information Relevant to Bargaining

On March 26, having not yet received any date for the start of negotiations, the Union wrote to the Company requesting copies of "the current insurance policy, both health and life including complete cost information." The Union also offered to go to the Company offices on April 11 to begin the negotiations unless it heard otherwise. (A 41; 64-65, 475.)

A few days later, the Union learned that employees had filed a decertification petition. Union representatives met with the majority of unit

employees to discuss their concerns. Based on those discussions, the Union filed an unfair labor practice charge. (A 69-75.)

On April 11, as proposed, union representatives went to the Company's premises to bargain, but, based solely on the pending decertification petition, the Company refused to negotiate. (A 24, 41; 66-68, 362-64, 476.) On April 30, the Union again wrote to the Company requesting negotiating dates. (A 41; 78-80, 477.) On May 3, the Union filed an unfair labor practice charge alleging that the Company was unlawfully refusing to bargain (A 41).

C. The Company Agrees to Bargain with the Union; the Company and Union Meet Five Times in a Little More Than Four Weeks; When the Parties are About to Reach Agreement, the Company Refuses to Negotiate and Withdraws Recognition from the Union Based on an Employee Petition; the Company Unilaterally Changes Employees' Terms and Conditions of Employment

By letter dated May 8, Company President Richard Baumgarten advised the Union that, although he thought it was inappropriate to bargain, he would do so beginning May 23. (A 41; 80-81, 366, 479-80.)

On May 23, company and union representatives met at the Company's facility for the first bargaining session. (A 41; 81, 308). The Union gave the Company a list of contract proposals, and a letter that renewed its earlier information request and that requested a list of employees participating in the Company's profit-sharing plan. The Company never provided the requested information. (A 42-44; 81-94, 141-42, 309-13, 481-82.)

The parties met again four times, on May 30, June 7, June 19, and June 25. (A 44; 85, 92-93, 308.) The negotiations were productive, and the parties had almost reached agreement on a new contract and agreed that they were one, or possibly two, meetings away from complete agreement. (A 24, 42; 388-89.) They agreed to meet again on July 3. (A 2; 388.)

In early July, a majority of employees signed a document stating that they did not wish to be "represented by any union," and that they were decertifying the Union. (A 44-45; 48-49, 238-44, 419-21.) On July 2, on the eve of potentially the final negotiation session, Company President Baumgarten told Union Business Representative James Kasmer that the Company would not bargain with the Union because it had evidence that the employees did not want the Union to represent them. (A 45; 96-98, 390, 622-23.) On July 12, the Company withdrew recognition from the Union. (A 45; 99, 624.)

Without notice to or bargaining with the Union, the Company subsequently changed several terms and conditions of employment, and ceased making required payments to the Union's apprentice and training program. (A 24, 46; 399.)

II. THE BOARD'S SECOND SUPPLEMENTAL DECISION AND ORDER

In the instant case, the Board's Second Supplemental Decision and Order, the Board held that when an employer has once unlawfully refused to recognize or bargain with an incumbent union, the employer may rebut the presumption that any

later expression of employee disaffection is tainted only by bargaining for a period of at least 6 months. (A 1.) The Board further held that the 6-month period may be extended, in any particular case, up to a year, depending on the following factors: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. (A 1.)

On the facts of this case, the Board held that the Company had failed to bargain for a reasonable time, and thus had failed to rebut the presumption that its earlier unlawful refusal to bargain tainted the July petition. It therefore reaffirmed its earlier conclusion that the Company violated Section 8(a)(5) of the Act by refusing to bargain and withdrawing recognition from the Union on the basis of that petition, and by unilaterally implementing changes in terms and conditions of employment. (A 7-8.)

As a remedy, the Board ordered the Company to cease and desist from the unfair labor practices found, including unlawfully refusing to bargain, and to comply with other provisions of its original order, requiring, among other things, that the Company post a remedial notice, provide certain requested information to

the Union, resume payments to a Union apprentice and training program, and make the fund whole for payments unlawfully withheld. (A 8, 9, 32-33.) The Board expressly declined to issue an affirmative bargaining order.

SUMMARY OF ARGUMENT

It already has been established in prior proceedings in this case that the Company committed numerous unfair labor practices, including unlawfully refusing to bargain with the Union, and that those unlawful acts presumptively tainted any subsequent showing of employee disaffection from the Union. It is also established that the Company may rebut the presumption of taint only by showing that it bargained with the Union for a reasonable time. Thus, under the law of the case, the Company's July 1990 refusal to bargain and withdrawal of recognition, based solely on a presumptively tainted expression of disaffection, were unlawful unless the Company rebutted the presumption of taint by showing that it bargained for a reasonable time.

On remand from this Court, the Board reasonably found that the Company did not bargain for a reasonable time. The Board reasonably held that, after unlawfully refusing to bargain with an incumbent union, an employer may rebut the presumption of taint only by bargaining for a period of at least 6 months. The Board fully explained its rationale that such a rule would best promote that Act's

goal of promoting industrial peace through collective bargaining, and also would promote employee free choice.

The Board also held that the period of bargaining may be extended up to 1 year based on various factors it has long considered in its reasonable time analysis, including the length of time the parties have bargained, the number of times they have met, and the progress of the negotiations. Because in this case the parties did not bargain for 6 months, and indeed, had only met 5 times in a little over 1 month, and because the Company abruptly ceased negotiating when one or two more meetings would have resulted in agreement, the Board held that the Company had not bargained for a reasonable time. Expressly considering this Court's instructions on remand, and taking into account the passage of time, the Board issued only a cease and desist order, rather than an affirmative bargaining order, the usual remedy for an unlawful refusal to bargain.

Before this Court, the Company largely ignores the Court's earlier decision and the Board's actual order. Instead of challenging the reasonableness of the Board's reasonable time test, the Company raises arguments it already has lost before this Court. First, the Company attempts to relitigate the presumption of taint that arose from its unlawful acts. The Company next challenges the requirement of bargaining for a reasonable time as a "per se" bargaining order.

Those arguments are barred by issue preclusion and the law of the case, and, in any event, lack merit.

Inexplicably, the Company also largely ignores the Board's cease and desist remedy and instead argues repeatedly that a bargaining order is not appropriate, notwithstanding the fact that the Board expressly did not issue a bargaining order here. The Company also challenges the Board's retroactive application of its reasonable time rule and a make-whole portion of the Board's remedial order. The Court lacks jurisdiction to consider those arguments because the Company never raised them before the Board.

STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

As this Court already has held in this case, the Board bears "primary responsibility for developing and applying national labor policy." (A 17 (citing *NLRB v. Curtin Matheson Scientific, Inc*., 494 U.S. 775, 786 (1990)).) If the Board is to fulfill its statutory role, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978). *Accord Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 788 (1996).

Further, it is well-established that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). In doing so, the Board uses its

"cumulative experience" to determine whether existing analytical models are responsive to actual conditions. *Id.* Accordingly, as the Court has also held in this case, the Board's legal rules are accorded "considerable" deference, "as long as [they are] rational and consistent with the Act, regardless of whether the Board's rule departs from its prior policy and whether [the Court thinks] a different rule would be preferable." (A 17 (citing *Curtin Matheson,* 494 U.S. 786-88, and *Auciello Iron Works,* 517 U.S. at 788).) *Accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 & n.11 (1984) (where Act is "silent or ambiguous" on the issue, the Board's interpretation of Act should be affirmed if "based on a permissible construction of the [Act]," even if that construction was not "the only one [the Board] permissibly could have adopted[,]" and even if it was not the one "the court would have reached if the question initially had arisen in a judicial proceeding").

The Board's findings of fact are "conclusive" when supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). Accordingly, a reviewing court "may not displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE COMPANY'S JULY 1990 REFUSAL TO BARGAIN AND WITHDRAWAL OF RECOGNITION FROM THE UNION AND SUBSEQUENT UNILATERAL CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

A. Applicable Principles and the Law of the Case

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . . ." For one year after the Board has certified a union as the collective-bargaining representative of employees in an appropriate unit, the union's continued majority status is conclusively presumed, and, absent unusual circumstances, an employer's refusal to bargain with the union during this period violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996); *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954).

After the expiration of the certification year and absent any bargaining agreement of reasonable duration, not exceeding 3 years, the presumption of continued majority status becomes rebuttable. *See Auciello*, 517 U.S. at 786; *NLRB v. Creative Food Design, Ltd.*, 852 F.2d 1295, 1300 (D.C. Cir. 1988). Thereafter, an employer may challenge a union's representative status if it is presented with objective evidence that the union actually lacks majority support.

See Levitz Furniture Co., 333 NLRB No. 105, 2001 WL 314139 (2001). An employer, however, may not rely on employee disaffection from the union to rebut the presumption of majority status where the employer has committed as yet unremedied unfair labor practices that reasonably could have contributed to employee disaffection. *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737 (D.C. Cir. 2000); *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992); *Guerdon Industries*, 218 NLRB 658, 659 (1975).

In the prior proceeding, the Court (A 17) affirmed the Board's findings that the Company committed unfair labor practices that tended to contribute to employee disaffection from the Union, including unlawfully refusing to bargain with the Union in April 1990. Despite the Company's present attempts to minimize the significance of its unlawful behavior (Br 25 & n.27-29), this Court (A 17) has already agreed with the Board that an unlawful refusal to recognize and bargain with an incumbent union is a "particularly egregious" unfair labor practice.

In its Supplemental Decision and Order, the Board, prompted by this Court's decisions in *Sullivan Industries v. NLRB*, 957 F.2d 890 (1992), and *Williams Enterprises v. NLRB*, 956 F.2d 1226 (1992), clarified and reaffirmed that presumptively, an unremedied refusal to recognize and bargain with an incumbent union contributes to and taints any subsequent employee disaffection from the union. That presumption can be rebutted only by a showing that the disaffection

arose after the employer resumed bargaining and bargains for a reasonable period of time. As the Board explained (A 27), the presumption prevents an employer from relying on its employees' disaffection from the union that is caused by the employer's unlawful acts to disrupt a bargaining relationship. The presumption therefore furthers the Act's overriding goal of preserving industrial peace by promoting "stability in collective bargaining relationships without unduly impairing employees' free choice." (A 27.) The presumption of taint fosters stability by removing any temptation from the employer "to avoid its bargaining duties in the hope that delay will undermine employees' support for the union." (A 27 (citations omitted).) *See also Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954). It also promotes employee free choice "by giving effect to the uncoerced choice of the majority of employees who selected the union as their bargaining representative before the employer unlawfully refused to recognize and bargain with the union." (A 27.)

In the prior proceeding, this Court affirmed the appropriateness of the presumption and agreed that rebutting the presumption required a resumption of bargaining that continues for a reasonable period of time. The Court agreed that the Board's rule is consistent with the Act and actually promotes employee free choice because it prevents an employer from "pointing to an intervening loss of employee support when such loss of support is a foreseeable consequence of the

[employer's] unfair labor practice." (A 17 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 51 n. 18 (1987).)

Thus, notwithstanding the Company's efforts (Br 21-22, 25-26) to relitigate the issue, the Board (A 26) and this Court (A 17) already have held that the Company's April 1990 refusal to bargain presumptively tainted any later employee expressions of disaffection. Whether the Company successfully rebutted the presumption is the issue the Court remanded to the Board. As we show below, the Board was reasonable in reaffirming that the Company failed to rebut the presumption and therefore, that the July 1990 refusal to bargain and withdrawal of recognition violated Section 8(a)(5) of the Act.

B. The Board Reasonably Held that the Company Failed to Bargain for a Reasonable Time Before Withdrawing Recognition From the Union

On remand from this Court, the Board held that when an employer has unlawfully refused to bargain with an incumbent union, a reasonable period of subsequent resumed bargaining before the union's majority status may be challenged will be no less than 6 months, and may be up to 1 year depending on a multifactor analysis. In describing the multifactor analysis, the Board explained that it was merely clarifying the relevance of the multiple factors that it had long considered in its reasonable time analysis. As the Board held, considering either the 6-month minimum period or the multiple factors it has long considered, the Company failed to bargain for a reasonable time before refusing to bargain with

and withdrawing recognition from the Union. We show that the Board's rule is reasonable and consistent with the Act, and its application of the rule in this case is supported by substantial evidence.

1. The Board's rule is reasonable and consistent with the Act

Acknowledging that it had not previously quantified what a "reasonable time" for bargaining must be, the Board determined on remand (A 1, 4) that when an employer has once refused to bargain with an incumbent union, there should be an insulated period of defined length during which the union's majority status cannot be challenged. The Board concluded that a defined insulated period would fulfill the central purposes of the Act, which are to promote collective bargaining and to protect employees' rights to freely choose or reject a collective-bargaining representative. The Board also observed (A 4) that its long-standing certification-year rule, under which a newly certified union's representative status may not be challenged for 1 year, has served the Act's purposes by providing certainty and preventing premature challenges to a union's status. Likewise, the Board reasoned (A 4), an employer that has refused to bargain with an incumbent union should be able to rebut the presumption of taint only after a resumption of bargaining that continues for an insulated period of defined minimum length. Similar to the certification-year rule, this requirement provides a measure of certainty which had

been lacking under existing law, and would remove from employers any temptation to challenge the union's status prematurely.

a. The Board reasonably chose 6 months as the minimum reasonable period of bargaining

In choosing 6 months as the minimum reasonable period, the Board relied (A 4) on its experience and relevant data. As the Board observed, in its experience, employers and unions typically require a period of approximately 6 months to negotiate and reach agreement on successor collective-bargaining agreements. The Board's expert observations in this regard were confirmed by relevant data collected by the Federal Mediation and Conciliation Service ("FMCS") revealing that, between 1998 and 2000, the average time between notice of proposed termination or modification of agreement and conclusion of renewal contracts ranged between 170 and 183 days. (A 11.) Thus, the Board reasonably concluded that 6 months is a fair estimate of the time necessary for an incumbent union to demonstrate what it can accomplish through collective bargaining.

The Board's focus on the need to give unions a fair chance to succeed in contract negotiations is entirely consistent with the central object of the Act, which, as the Supreme Court repeatedly has held, is "industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution

of labor disputes between workers and employers."[2] As this Court observed in upholding the Board's presumption of taint, an employer's refusal to bargain with an incumbent union deprives the union of its ability to demonstrate the tangible benefits to be derived from union representation. (A 17.) Thus, as the Board properly concluded (A 3-4), before the lingering effects of the employer's unlawful refusal to recognize or bargain can be overcome, the union must have a chance to demonstrate what it can do for the employees in collective bargaining.

Moreover, as the Board held, and contrary to the Company's argument (Br 21-27), allowing the Union a chance to succeed in bargaining actually promotes, rather than undermines employee free choice because, until the lingering effects of the Company's unlawful conduct are undone, the employees cannot exercise a *free* choice regarding the Union's representative role. *See Machinists v. NLRB*, 311 U.S. 72, 82 (1940) (reasonable to conclude that unless the effect of the refusal to bargain "is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act

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[2] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). *Accord NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794 (1990) ("Board's refusal to adopt an antiunion presumption is . . . consistent with the Act's overriding policy of achieving industrial peace."); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) ("The underlying purpose of [the Act] is industrial peace."); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952) ("The . . . Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.").

contemplates"). Thus, the 6-month minimum period promotes both collective bargaining and employee free choice, and therefore is consistent with the Act.

The Company barely mounts an argument against the Board's choice of 6 months as the minimum reasonable period for bargaining. It addresses the Board's choice, directly, only in a single footnote (Br 14 n.17), with no legal authority. Even there, the Company fails to state a single reason why the Board's choice of 6 months might be inappropriate. Instead, the Company argues that the FMCS data upon which the Board relies are of questionable utility because the FMCS does not "collect data regarding the *conclusion* of collective bargaining, nor distinguishes such data by unit size, industry or location." (Br 14 n.7 (emphasis original).)

The Company's first criticism simply is incorrect as a matter of fact. As the Board made clear (A 4), the data it considered reflects the average time elapsed between notice of intent to modify and the conclusion of an agreement. (A 11.) Therefore, the data does reflect the conclusion of collective bargaining. As to the Company's remaining criticism, the Company has offered no clue as to why unit size, industry, or location should be relevant to the Board's general rule, and certainly has made no argument, either to the Board or to this Court, that any of those factors should be determinative in this case.[3]

[3] The Company also argues (Br 14 n.7) that the Board did not specify what experience it was relying on. It is self-evident that the Board was relying upon its expertise and experience in labor relations. That expertise repeatedly has been acknowledged by the Supreme Court. *See e.g.*, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 798 n.9 (1990).

Thus, aside from its incorrect assertion that the Board's rule improperly imposes a bargaining order, which we answer below (p. 36-38), the Company has offered no reason to reject the Board's rule.

b. The Board reasonably held that the reasonable period may be extended up to 1 year based on multiple factors

The Board established 6 months as the *minimum* period of bargaining required to rebut the presumption of taint arising from an unlawful refusal to bargain with an incumbent union. Recognizing that unscrupulous employers might simply drag their feet to avoid reaching a contract within the 6-month period, the Board further held that the 6-month period could be extended beyond 6 months up to 1 year. Significantly, that same concern animated the Supreme Court's approval of the Board's certification-year rule:

> It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.

Brooks v. NLRB, 348 U.S. 96, 100 (1954). *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (the presumption of majority support in the successorship context "remove[s] any temptation on the [employer's part] to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees").

The Board held (A 1, 4) that the reasonable period may be extended in any particular case depending on the following factors: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. After observing (A 4-5) that those factors are similar to those it has long examined in its "reasonable time" analysis, the Board went on to clarify the relevance and application of each of the factors. In sum, the Board was reasonable in allowing that, in some circumstances, the minimum period could be extended up to 1 year.[4]

2. Substantial evidence supports the Board's finding that the Company failed to bargain for a reasonable period under either the new 6-month-minimum rule or the long-standing multifactor analysis

After resuming bargaining following its unlawful refusal to bargain, the Company met with the Union for only five bargaining sessions in a period of only

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[4] In setting a maximum period, the Board (A 4) reasoned that unions, employers, and employees should know the maximum period during which any representative challenge would be barred. In choosing 1 year as the maximum period, the Board (A 4) relied on its observations in applying the 1-year certification-bar rule, namely, that 1 year is sufficient to enable unions to demonstrate what they can accomplish through collective bargaining. The Company does not challenge the reasonableness of the Board's rule in this regard.

a little over 1 month, and broke off negotiations when the parties were far from impasse, and indeed had all but reached agreement. (See above, p.11.) As the Board held, the Company's brief period of bargaining fell far short of the minimum 6 months required for a reasonable bargaining period. On that ground alone, the Company failed to rebut the presumption that the employee petition on which its July 1990 refusal to bargain and withdrawal of recognition relied, was impermissibly tainted by the April 1990 refusal to bargain.

Moreover, as the Board held (A 7-8), in addition to falling short of the minimum 6-month period, the Company's brief and abruptly aborted negotiations did not constitute a reasonable period of bargaining even under its long-established factors.

a. The Board reasonably considers the number of meetings and length of time parties have negotiated in determining a reasonable time for bargaining

In remanding the Board's supplemental decision to the Board, this Court (A 18) criticized the Board for first announcing that the passage of time or number of meetings was not determinative, and then examining both factors in finding that a reasonable time had not passed in this case. On remand, the Board (A 5) acknowledged that its earlier statement of the law may have been misleading in that it might be read to state that those factors are not at all relevant. The Board

(A 5) clarified that it meant that "those factors are relevant but not alone dispositive of whether a reasonable time has elapsed."

Indeed, as the Board (A 5) pointed out, the cases upon which it relied in its supplemental decision demonstrate that this is so. (See A 28 (citing *I.M. Jaffe & Sons*, 176 NLRB 537 (1969) (reasonable time had not elapsed when parties met only 4 times during 2-month period, were not at impasse, and had scheduled another bargaining session); *Shangri-La Health Care Center*, 288 NLRB 334, 336, 338 (1988) (reasonable time had not elapsed where parties had met only 5 times during 2-month period, there was no impasse, and parties agreed to meet again); *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71 (1965) (reasonable time had not elapsed after only 9 bargaining sessions during more than 4 months, there was no impasse, and another meeting was scheduled).)

After noting that the relevance of the passage of time to determining a "reasonable time" is "obvious," the Board (A 6) expanded that "[n]egotiations generally require time and meetings to bear fruit." The Company apparently concedes as much because it raises no argument as to why the Board should not consider the length of negotiations or the number of meetings.[5]

[5] To the extent the Company even considers this issue, it relies (Br 12) solely on the Board's earlier statement that the passage of time and number of meetings is not determinative. The Company neither addresses the Board's clarification, nor raises any argument that the cases cited by the Board in its initial decision and in its second supplemental decision (A 5 n. 37) should not control here.

Thus, as the Board held (A 7-8), by meeting only 5 times in a little more than 4 weeks, the parties simply did not have enough time to reach agreement, though they soon would have, had the Company not abruptly ceased negotiating. As the Board reasonably held, both the fact that they had too little time to reach agreement, and, as we discuss next, the fact that they needed just a little more time, indicate that a reasonable time had not yet passed.

b. The Board reasonably held that the parties' proximity to agreement indicated that a reasonable period had not elapsed

As the Board (A 6) observed, it long has considered progress toward reaching agreement, particularly the likelihood of reaching agreement in the near future, as one factor indicating that a reasonable period for bargaining has not elapsed. For example, in *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67 (1965), the Board held that a reasonable time had not elapsed where the parties had reduced their agreement to writing and the union agreed to submit to the employees the employer's offers on the two sole remaining disputed issues. In several more recent decisions, the Board likewise has held that a reasonable time had not elapsed where the parties were close to, but had not yet reached agreement before a challenge to the union's representative status arose. *See MGM Grand Hotel, Inc.*, 329 NLRB 464, 467 (1999) (reasonable time had not passed after more than 11 months of bargaining where parties "had made substantial progress toward

reaching agreement, had few remaining issues to resolve," and indeed reached agreement within a few days after a decertification petition was filed); *Ford Center for the Performing Arts*, 328 NLRB 1, 2 (1999) (reasonable time had not passed even though 9 months had elapsed where parties were on the verge of complete agreement when competing union filed election petition); *Top Job Building Maintenance Co., Inc.*, 304 NLRB 902, 908 (1991) (reasonable time had not passed where parties had resolved some issues, were planning to meet again and had reasonable prospects of soon concluding an agreement).[6]

As the Board held, it will continue to consider progress toward agreement, but how the factor will cut will depend on the circumstances. As the Board explained (A 6), when parties are close to agreement and there is a strong possibility that they will soon reach agreement, it makes sense to give them a little more time to negotiate. On the other hand, as the Board (A 6-7) explained, if after 6 months of bargaining the parties are not close to agreement, even if they have made progress, giving them a little more time is unlikely to enable them to reach agreement.

The Board's reasoning is entirely consistent with the Act. As the Board explained in *MGM Grand*, the presumption that a union's majority status continues

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[6] Thus, the Board so held both before and after *Brennan's Cadillac, Inc.*, 231 NLRB 225 (1977), and *Tajon, Inc.*, 269 NLRB 327 (1984), upon which the Company (Br 13, 28, 42, 44) exclusively relies.

at least until an employer has bargained for a reasonable time "is not based on an absolute certainty that the union's majority will not erode. Rather it is a policy judgment which seeks to ensure that the bargaining representative chosen by a majority of employees has the opportunity to engage in bargaining to obtain a contract on the employees' behalf without interruption." 329 NLRB at 466 (citing *Brooks v. NLRB*, 348 U.S. 96, 101 (1954)). In addition to giving unions a fair chance to reach agreement, the policy also encourages employers to engage in good faith bargaining without fearing that, at the last moment, their efforts will come to nothing if its employees seek to choose another bargaining agent or none at all. As the Supreme Court has observed, "[i]t is scarcely conducive to bargaining in good faith for an employer to know that . . . if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent." *Brooks*, 348 U.S. at 100. Thus, requiring parties on the verge of agreement to bargain a little bit longer promotes the Act's central purpose of promoting collective-bargaining agreements and thereby promoting industrial peace.

Moreover, allowing the parties additional time to reach agreement in this context, where an employer's unlawful refusal to bargain has tainted any expression of disaffection, promotes employee free choice. As the Board held (A 3-4), employees may not exercise a *free* choice unless the lingering effects of

the employer's unlawful refusal to bargain are eliminated by giving the union a chance to succeed in collective bargaining.

The Company raises two arguments against the Board's view as to how this factor cuts in the analysis. First, the Company objects that the Board improperly overruled its prior decisions in *Brennan's Cadillac, Inc.*, 231 NLRB 225 (1977), and *Tajon, Inc.*, 269 NLRB 327 (1984). The Company ignores both that those cases themselves were inconsistent with prior and subsequent decisions of the Board, and that the Board is privileged to re-examine its precedent in light of its experience. As the Supreme Court has made clear, "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting.")).

Here, the Board (A 6-7) carefully explained its rationale for holding that nearness to agreement is one indication that a reasonable time for bargaining has not elapsed. In its earlier supplemental decision, the Board (A 28) clearly explained that it overruled *Brennan's Cadillac* and *Tajon* -- to the extent that they "indicate that progress toward reaching agreement and absence of impasse are factors indicating that a reasonable time for bargaining has elapsed" -- in light of their inconsistency with the Board's prior and subsequent cases. Here, the Board

(A 7) further explained that it was overruling those cases to the extent that they were inconsistent with its view that a union must have an opportunity to prove its mettle so that the employees may make a free choice without the taint of the employer's unlawful conduct.[7] Thus, the Board has clearly explained its reasonable rule as well as its departure from the two cases on which the Company solely relies. Nothing more is required.

Second, the Company complains (Br 26-27) that, had it continued to bargain with the Union, the negotiations would have resulted in a contract and the attendant contract bar to any challenge to the Union's representative status. The Company asserts (Br 26-27) that the July 2 petition was an attempt by the employees to avoid that very consequence.[8] The Company has provided no factual

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[7] Neither *Brennan's Cadillac* nor *Tajon* involved the question of taint arising from an employer's earlier refusal to bargain. On the contrary, both cases involved challenges to the union's representative status, apparently untainted by any employer misconduct, arising after the employer had voluntarily recognized and bargained with the union for a time.

[8] The Company's reliance (Br 20, 24, 29) on the General Counsel's position statement to the Board is unavailing. To begin, the General Counsel merely was acknowledging the possibility that the July petition might reflect dissatisfaction with the Union on the eve of agreement. More fundamentally, however, the Board is not bound by positions taken by the General Counsel in the course of litigation. *See Chelsea Industries, Inc. v. NLRB,* 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting as "silly" an employer's attempt to rely on a memorandum issued by the General Counsel, noting that the "General Counsel's understanding of the case law before the present decision issued" is "of no moment," and "the court will take no note of it"); *see generally NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987) (discussing the difference between the General Counsel's prosecutorial role and the Board's adjudicative role).

support for that argument, and the Board is aware of none. Moreover, to the extent the Company implies that the employees were reacting to an attempt by the Union to substitute its pension plan for the Company profit-sharing plan, the record indicates that the Union made no such attempt during the 1990 bargaining. (A 373-89, 477, 482.) However, even assuming the Company's speculation were true, and the employees were unhappy with the fruits of the parties' bargaining as of July 2, nothing in the record suggests that they could not simply have rejected any proposed contract. Under the circumstances, the Board was fully justified in "giving short leash to the employer as vindicator of its employees' organizational freedom." *See Auciello*, 517 U.S. at 790.

C. The Company's Defenses Lack Merit

On review, the Company does not deny that the Board's application of the 6-month rule compels the conclusion that it violated the Act. Instead, the Company challenges the Board's application of the rule on the following grounds: (1) the rule is a *de facto* bargaining order in every case (Br 17-24); (2) application of the rule frustrates the policies underlying the Act (Br 24-29), and (3) even if the rule is rational and consistent with the Act, the Board's retroactive application of the rule in this case is improper (Br 41-45). We now show that the Company's claims are not properly before this Court, and, in any event, that the rule is rational and consistent with the Act and that the Board properly applied the rule retroactively.

1. The Company failed to seek reconsideration by the Board and thus may not now challenge either the reasonableness or the retroactive application of the Board's 6-month rule

Section 10(e) of the Act (29 U.S.C. § 160(e)) states, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances." That statutory prohibition creates a jurisdictional bar against judicial review of issues not raised before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Here, the Company did not challenge either the reasonableness or the retroactive application of the Board's rule until the Company filed its opening brief to this Court. Because the Company did not raise its challenges to the reasonableness of the Board's rule or to its retroactive application through a motion for reconsideration by the Board, it failed to preserve judicial review on either issue. *See Woelke & Romero*, 456 U.S. at 665-66; *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998) (failure to object to the Board's decision in a motion for reconsideration or rehearing prevents consideration of the questions by the court); *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 49 (D.C. Cir. 1990) (party waived claim that new rule should have been retroactively applied by failing to assert it before the Board).

Thus, the Company's arguments are not properly before this Court. In any event, as we show below, they lack merit.

2. The Company's attack on the 6-month rule as a *per se* bargaining order really is a belated attack on this Court's earlier holdings which is barred by issue preclusion and the law of the case, and, in any event, lacks merit

Although the Company claims (Br 21-23) to be objecting to the Board's 6-month rule, its attack really is aimed at the Board's and this Court's earlier findings that an unlawful refusal to bargain with an incumbent union raises a presumption of taint, and that the taint can only be rebutted by bargaining for a reasonable time. First, the Company attacks the presumption itself, complaining (Br 21) that the Board presumes taint in every case "without showing any causal connection." The Company attributes (Br 21) that presumption to the Second Supplemental Decision and Order, without acknowledging that the presumption was established by the Board in its 1996 Supplemental Decision and Order and affirmed by this Court in its 1997 opinion. Therefore, the Company's challenge on this settled issue is barred by issue preclusion[9] and the law of the case doctrine. *See McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1106 (D.C. Cir. 2001) (citing *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995) ("[L]aw-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court.")),

[9] *Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 326 (1979)

petition for cert. filed, 70 U.S.L.W. 3656 (Apr. 11, 2002) (No. 01-1521).

Next, the Company attacks (Br 21) the Board's holding that the presumption of taint may be rebutted only by bargaining for a reasonable period. Although nominally couching its attack (Br 21) as a challenge to the 6-month period, the Company attacks not the length of the period, but the very notion that "the employees' statutory right to change their bargaining representative must be automatically disregarded to assure that the union's representative status cannot be questioned." The Company's quarrel therefore, is not with the Board's definition of a "reasonable time," but with *any* requirement to bargain with the union for a "reasonable time." The Company's objection would apply equally to a Board holding that the "reasonable time" must be at least one week, or even one day, of bargaining. Although the Company utterly ignores it, this Court has already decided this issue in favor of the Board. This issue is therefore barred by issue preclusion and the law of the case.[10]

In addition to being barred, the Company's argument that the Board's rule is a "de facto" bargaining order utterly lacks merit. The rule quite simply is not a remedial bargaining order, but rather, is an evidentiary presumption that goes toward liability. The cases are legion in which reviewing courts, including the Supreme Court, have approved

[10] See cases cited at p. 36 & n.9, above.

the Board's imposition of a rule requiring some period of bargaining in many contexts.[11] The Company has pointed to no case in which any court has applied the analysis it seeks to a non-remedial rule, as opposed to a remedial bargaining order. Nor has the Company provided any reason why this Court should apply that analysis here. The Company's reliance (Br 17-24) on remedial bargaining order cases in asking the Court to apply a *Gissel* bargaining order analysis[12] in this case, therefore is unavailing.

3. The Company's argument that the Board's holding frustrates employee free choice also ignores this Court's earlier holding

The Company's next argument (Br 24-29), that the Board's application of the rule here undermines employees' statutory right to choose whether they want union representation, is similar to an argument this Court (A 17) already has rejected. As it did before this Court earlier, the Company ignores the fact that "the presumption comes into play only when the employer's failure to recognize and bargain with a duly elected union precedes the union's loss of majority support." (A 17.) Under those circumstances, as this Court held, the Board's requirement of a reasonable

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[11] *E.g.*, *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) ("irrebuttable presumption" of union's majority status for the duration of a contract of reasonable length, up to 3 years); *Brooks v. NLRB*, 348 U.S. 96, 100 (1954) (employer required to bargain for 1 year after union's initial certification); *Franks Bros. v. NLRB*, 321 U.S. 702, 706 (1944) (employer must bargain for a reasonable period after voluntary recognition); *Poole Foundry & Mach. Co.*, 95 NLRB 34, 36, *enforced*, 192 F.2d 740, 742 (4th Cir. 1951) (settlement of charges in which employer agrees to bargain precludes any challenge to union's majority status for a reasonable period).

[12] *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969).

period of bargaining "actually supports employee free choice because it prevents an employer from 'pointing to an intervening loss of employee support for the union when such loss of support is a foreseeable consequence of the employer's unfair labor practice'" (A 17 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 51 n. 18 (1987)). Likewise, contrary to the Company's recycled argument (Br 23-29), the Board's application of its reasonable period test here promotes employee choice because, as the Board (A 4) held, "the lingering effects of the unlawful conduct must be effectively eliminated before employees can exercise *free* choice."

4. The Board's retroactive application was proper, and resulted in no injustice, much less manifest injustice

Aside from being barred, the Company's argument (Br 41-45) that the Board's rule should not be applied retroactively is meritless. As the Supreme Court recognized, an administrative agency is entitled to apply newly adopted interpretations retroactively if "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles" outweighs the adverse effects of such application. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). *Accord Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989) ("new rules announced in agency adjudications may be applied retroactively absent any 'manifest injustice'"). The Board's usual practice of applying new rules to "all pending cases in whatever stage" unless to do so would result in manifest injustice

accords with those principles. *See Levitz Furniture Co.*, 333 NLRB No. 105, 2001 WL 314139, at *17 & n.66 (quoting *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), *enforced*, 843 F.2d 770 (3d Cir. 1988)).

Here, there is no countervailing injustice to the Company to weigh against the Board's usual practice of retroactive application. Notwithstanding the Company's bald assertion to the contrary (Br 44), there simply is no evidence that the Company was relying on the state of Board law when it refused to bargain and withdrew recognition from the Union. Indeed, it could not have been, because, as the Board held (see p.27-29, above), even under the factors the Board has long considered, the parties' few meetings in a brief period, abandoned on the eve of agreement, did not constitute a reasonable period of bargaining. Moreover, because its actions were unlawful even under then-existing Board law, the Company will suffer no prejudice from the retroactive application of the Board's reasonable rule. Retroactive application thus is proper.

In sum, the Board reasonably concluded that the Company did not bargain for a reasonable time, and therefore failed to rebut the presumption that its earlier unlawful refusal to bargain tainted the July petition. The Board therefore properly reaffirmed its earlier conclusion that the Company violated Section 8(a)(5) of the Act by refusing to bargain and withdrawing recognition from the Union on the

basis of that petition, and by subsequently unilaterally implementing changes to terms and conditions of employment.

II. THE BOARD ACTED REASONABLY WITHIN ITS DISCRETION IN ORDERING THE COMPANY TO CEASE AND DESIST FROM THE UNFAIR LABOR PRACTICES FOUND

A. Applicable Principles

Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board is charged with "the task of devising remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The "particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.'" *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943) (citation omitted). The Board's power to fashion remedies is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Accordingly, the Board's order may not be disturbed "[u]nless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric*, 319 U.S. at 540.

The basic purpose of a Board remedial order is to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). Restoration of the status quo ante not

only secures the rights of the injured parties, but also prevents the wrongdoer from gaining advantage through its wrongful conduct. *Id*.

B. The Board Acted Well Within its Broad Remedial Discretion in Ordering the Company to Cease and Desist From Further Violations of the Act

The Board (A 9, 32-33) ordered the Company to cease and desist from the unfair labor practices found, including unlawfully refusing to recognize and bargain with the Union. Such an order is the usual order in an unfair labor practice case, and indeed, is required by Section 10(c) of the Act, which provides that if the Board finds that any person has engaged in an unfair labor practice, the Board "shall issue . . . an order requiring such person to cease and desist from engaging in such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act. 29 U.S.C. § 160(c).[13]

As the Supreme Court has recognized, and this Court has emphasized, a cease and desist order "merely requires an employer to 'conform his conduct to the norms set out in the Act.'" *Caterair Int'l v. NLRB*, 22 F.3d 1114, 1122 & n.4 (D.C. Cir. 1994) (quoting *ILGWU v. NLRB*, 366 U.S. 731, 740 (1961)); *accord Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994) (same).

[13] The Board also ordered the Company to post a notice, and to undo the effects of its unlawful unilateral changes by resuming payments to the Union's apprentice and training program and by making the program whole for payments it had unlawfully withheld. (A 33.) As discussed below, the Company failed to challenge those ordinary make-whole provisions before the Board, and thus, may not challenge them here.

Certainly, prior to its second unlawful refusal to bargain with the Union, the Company was under an obligation to conform its conduct to the norms set out in the Act, including that it continue to bargain in good faith with the duly elected collective-bargaining representative of its employees. Thus, the Board's order, requiring the Company to cease and desist from unlawfully refusing to recognize and bargain with the Union, does no more than restore the status quo ante, and is well within the Board's broad remedial discretion.

C. The Company's Defenses Lack Merit

1. The Board plainly did not issue a bargaining order

Contrary to the Company's unsupported claim, following this Court's remand, the Board expressly declined to issue an affirmative bargaining order. Instead, the Board (A 8-9, 32-33) ordered the Company to cease and desist from unlawfully refusing to bargain. The Company argues at length (Br 17-21, 24-26, 33-37) that the Board's cease and desist order is, in reality, a bargaining order. The Company has provided no explanation for that unsupported claim, and none exists.

The Board (A 8) and this Court have noted that, unlike an affirmative bargaining order, a cease and desist order does not raise a certification bar requiring an employer to bargain for a "reasonable time." *See Caterair Int'l v. NLRB*, 22 F.3d 1114, 1121 (D.C. Cir. 1994); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994); *Williams*

Enterprises, Inc. v. NLRB, 956 F.2d 1226, 1237-38 (D.C. Cir. 1992).[14] Therefore, as this Court has pointed out, "the cease and desist and affirmative bargaining orders have very different legal and practical consequences." *Caterair*, 22 F.3d at 1122. Although this Court considers an affirmative bargaining order to be an "extreme remedy," it holds a cease and desist order in "stark contrast" in that the latter "merely requires an employer to 'conform his conduct to the norms set out in the Act. . . . No further penalty results.'" *Id*. at 1122 & n.4 (quoting *ILGWU v. NLRB*, 366 U.S. 731, 740 (1961)). *Accord Williams*, 956 F.2d at 1237-38 ("the strict requirements surrounding a bargaining order do not apply to a [cease and desist order]"). Thus, the cease and desist remedy issued in this case is in no way a "de facto" bargaining order.

The Company's argument that the Board's definition of a reasonable period somehow transforms the cease and desist order here into a 6-month bargaining order utterly lacks merit. To begin, the Board directed that its cease and desist order would be effective only "until and unless, after complying with the other provisions of the Order [posting a notice and making the union apprenticeship fund whole], the Company is presented with objective evidence sufficient to warrant its challenging the Union's majority status again." (A 8 (citation omitted), A 33.) In

[14] The Board expressly recognized here that its order, "limited to a cease and desist remedy[,] will not ensure that the [Company] will recognize and bargain with the Union for a reasonable time." (A 8.) Thus, contrary to the Company's specious claim (Br 22 n.24), the Board's substitution of a cease and desist order for its earlier affirmative bargaining order was more than a change in "nomenclature."

addition, the Board (A 8) specifically acknowledged that the cease and desist order "will not ensure that the [Company] will recognize and bargain with the Union for a reasonable time."

Moreover, the Company's argument ignores that the requirement to bargain for a reasonable period arises in the context of *unremedied* refusals to bargain. It certainly is true that, except in extraordinary circumstances, bargaining in good faith for a reasonable period is the only way to remedy an unlawful refusal to bargain. However, in this case, the Board has held that the Company can remedy its prior unlawful acts by ceasing and desisting from further violations of the Act, posting a notice, and making the Union's apprentice and training program whole.[15] In sum, in arguing that a cease and desist order is really a bargaining order, the Company utterly ignores the Board's actual order. The Court should decline the Company's invitation to do likewise.

2. The Company is precluded from challenging the Board's order requiring it to make delinquent payments to the Union's apprentice and training program

The Company argues (Br 38-39) that the Board's order requiring it to pay delinquent contributions to the Union's apprentice and training program is

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[15] Contrary to the Company's repeated unsupported claim that the Board ignored this Court's earlier decision, the Board chose the remedy here after expressly taking account of this Court's instructions on remand. (A 8.) The Board also expressly considered the passage of time, contrary to the Company's claim (Br 35).

improper for several reasons. Its contentions are not properly before the Court because they were never raised to the Board. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)). Before the Board, the Company merely excepted to the Board's remedial order "in its entirety." (SA 23.) This Court repeatedly has held that such a generalized exception to the proposed order is insufficient to preserve any particular objection for appeal. *See Scepter Inc. v. NLRB*, 280 F.3d 1053, 1056 (D.C. Cir. 2002); *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497 (D.C. Cir. 1996) (exception to the Board's proposed remedy "in its entirety" "is far too broad to preserve a particular issue for appeal"); *Prime Service, Inc. v. NLRB*, 266 F.3d 1233, 1241 (D.C. Cir. 2001) (same). As this Court has explained, such an exception really amounts to nothing more than a categorical denial which "does not place the Board on notice that its particular choice of remedy is under attack, much less that its failure to explain that choice is also the subject of a challenge." *Quazite*, 87 F.3d at 497.

Indeed, the Company's belated challenge is particularly egregious here because the Company not only failed to raise a specific exception to the proposed order originally, but also it utterly failed to raise the issue to the Board on remand, or by filling a motion for reconsideration. To allow the Company belatedly to again raise this issue in this Court despite repeatedly failing to raise it before the

Board improperly "would be to set the Board up for one ambush after another." *Quazite*, 87 F.3d at 497.

Moreover, the Company raised a similar objection to this portion of the Board's order when it challenged the Board's 1996 Supplemental Decision and Order before this Court. Rejecting that argument, along with the Company's "numerous [other] challenges to the Board's handling of its case," this Court affirmed the Board's order "in all respects" except its application of the reasonable period test to this case, and its issuance of an affirmative bargaining order. (A 16, 20.) Thus, this issue too, already has been decided.

CONCLUSION

For the foregoing reasons, the Board requests that the Court enter a judgment denying the petition for review, and enforcing the Board's order in full.

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FREDERICK HAVARD
Supervisory Attorney

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BRIDGET O'CONNOR
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570
(202) 273-2991
(202) 273-4485

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON,
Associate General Counsel

AILEEN A. ARMSTRONG,
Deputy Associate General Counsel,

National Labor Relations Board.

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